Supreme Court of the United States

OCTOBER TERM, 1940

No.....

CHARLES J. WOLFE,

Petitioner,

vs.

C. F. MURPHY, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH JUDICIAL CIRCUIT.

I.

OFFICIAL REPORTS OF OPINION DELIVERED BY THE COURTS BELOW:

The decision of the lower court here sought to be reviewed has not been officially reported. It appears in the certified transcript filed herewith (R.....).

II.

STATEMENT OF JURISDICTION:

Statutes sustaining the jurisdiction of the Court in proceedings to review decisions and judgments or decrees of the Circuit Court of Appeals on certiorari:

Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, Ch. 229, Section 1 (43 Statutes 938), now appearing in U. S. C. A., Title 28, Section 347.

Act of Congress of February 13, 1925, Ch. 229, now appearing as U. S. C. A., Title 28, Section 350 (as amended).

III.

STATEMENT OF FACTS

As the facts have been quite fully reviewed in the appending petition repetition here is unnecessary. Any omitted details will be referred to at the appropriate points in the argument submitted herewith.

IV.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

(a) In adjudging that "both on grounds of a logical interpretation of Iowa Statutes and on the authority of Iowa decisions, that plaintiff's cause of action for malicious prosecution accrued on October 20, 1932, and that when finally commenced it was barred by the two year statute of limitations. The judgment of the District Court dismissing the case on that ground was right, and it is affirmed."

V.

ARGUMENT

1. Presentation of Facts.

The question which took most of the Court's attention was whether or not the appellant was discharged from custody by an entry on the calendar of the Court, and whether a *nunc pro tunc* order could be entered in the manner in which it was entered. If not, then petitioner should be allowed to try his case on the merits.

Counsel in argument admitted that the calendar is not part of the records of the Court. The Court below found that this was the law of Iowa (R.....). On October 6, 1937, the Iowa Court entered its findings and judgment in the case, which is the only record of the discharge of petitioner (except entry on the calendar which is no part of the record) (R.....).

This action was commenced within two years after entry of the order to correct the record, which was October 6, 1937 (R.....).

2. Nunc Pro Tunc Order Ineffective.

The Iowa judge, on October 6, 1937, issued what appears to be a *nunc pro tunc* order and had it entered in the record as of October 20, 1932, which, if lawful, would cut off appellant's right of appeal.

The Supreme Court of Iowa in the case of *Chariton & Lucas County National Bank vs. Taylor,* 213 Iowa 206, 240 N. W. 740, said:

"The office of *nunc pro tunc* entry is not to make an

order now for then, but to enter now for then an order previously made."

Pacific Co. vs. Pender, 14 Ariz. 673, 134 Pac. 289.
I *Freeman on Judgments*, Section 131.

3. Action Was Not Barred by Statute of Limitations.

The Statute of Limitations therefore began to run October 6, 1937, for a two-year period provided by statute, Code Section 11007, which ended October 6, 1939. This suit was begun, and process was served upon the appellees, C. F. Murphy and F. E. Sharpe, on the 4th day of October, 1939, and on the defendants, M. X. Geske and George B. Richter, on the 5th day of October, 1939, and consequently, the action has been started in time.

This being a case originating in Iowa, appellant takes the position that the decisions of the Supreme Court of that state govern. The rule is laid down in 28 U. S. C. A., Action 725, page 232, Note 111, as follows:

> "In the absence of provisions in the federal statutes expressly regulating the matter, * * * the federal courts will, as a general rule, follow the construction given by the highest court of the state to such a statute."

The Court below erred in not following the decisions of the Supreme Court of Iowa, because it considered an entry by the Iowa judge on his calendar to be a judgment of that Court, whereas as above shown, it is not a record of the Court at all, and a mere nullity.

Defendant should have been discharged by a judgment entered into the record book by the Clerk, and was so discharged on October 6, 1937, by such legal formality. Con-

sequently, he now insists that the statute began to run on that date.

This action was brought for malicious prosecution. The appellant was finally discharged by order of the Iowa Court on October 6, 1937. This action was brought by service of the Summons and Complaint on the defendants on October 4th and 5th, 1937, hence the two-year Statute of Limitations did not run against appellant.

The Statute of Iowa contains specific directions as to the dismissal of criminal actions. Section 14027 of the Iowa Code provides as follows:

> DISMISSAL BY COURT—EFFECT.
>
> "The Court upon its own motion or the application of the County Attorney in the furtherance of justice may order the dismissal of any pending criminal prosecution, the reason therefore being stated in the Order, and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner * * *."

We wish to call the Court's attention to the fact that this statute has not been followed in these proceedings and we are firmly of the opinion that a *nunc pro tunc* order cannot cure the defect.

Section 11582 of the Iowa Code provides as follows:

> JUDGMENTS AND ORDERS ENTERED.
>
> "All Judgments and Orders must be entered on the record of the Court and must specify clearly the relief granted or Order made in the action."

This Statute was not followed by the Iowa Court.

The Grand Jury met on October 20, 1932, but did not indict or discharge the defendant, petitioner herein; the Grand Jury also met on December 7, 1936, February 8, 1937, and

October 4th, 1937, and in each case failed to indict or discharge the petitioner. We are, therefore, firmly of the opinion that petitioner's rights have been trampled upon and that Judgment of the Court below should be reversed and this case returned to the District Court for trial on the merits, because the records of the Court show no discharge of the petitioner until October 6th, 1937. Code Section 13446.

VI.

It is, therefore, respectfully submitted that the Writ here sought should be granted and that upon consideration of the merits, the Order and Judgment of the Circuit Court of Appeals should be reversed.

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